IN THE

Supreme Court of the United States

---------- TERM, 1925.

No. 381 58

JOHN W. STEPHENSON, EMMA THOMSON, JENNIE STEPHENSON, MARY S. WEIMER, and W. B. STEPHENSON, *Appellants,*

vs.

H. L. KIRTLEY, H. W. HEROLD and F. E. CAWLEY, *Appellees.*

APPEALED FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF ON BEHALF OF H. L. KIRTLEY AND H. W. HEROLD, TWO OF THE APPELLEES.

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STATEMENT OF FACTS.

An examination of appellants' brief shows several errors of commission and omission in stating the facts which are important to a correct understanding of the case and a decision of the points involved, and we, therefore, think it well to set out herein a brief reply to the statement of facts, elaborating on certain matters neces-

sary to an understanding of the case, correcting errors referred to and supplying facts omitted from appellants' statement.

It is true, as stated in appellants' brief, that this is a suit in equity instituted in the District Court of the United States for the Southern District of West Virginia, as set out in said statement, and that the object and purpose is to have set aside certain decrees of the Circuit Court of Nicholas County and a deed. We think it well at this point to make it clear the nature of the suit in the Circuit Court of Nicholas County and the proceedings had therein in order that the true situation respecting these two suits, independent in their nature, subject and inception, may be clearly understood.

The suit referred to as being brought in the Circuit Court of Nicholas County was also a suit in chancery. The same was brought by F. E. Cawley, a co-defendant with the appellees represented in this brief. Said suit was to recover on certain foreign judgments held by said Cawley against said W. B. Stephenson and others and was based upon an attachment sued out in said suit and levied on the interest of W. B. Stephenson in certain real estate in said County, and in addition to seeking to have said judgments enforced and said real estate sold to satisfy same said bill also asked to have set aside certain deeds made by said W. B. Stephenson to others as being voluntary conveyances, fraudulent as to creditors under the law of West Virginia, etc. All of the defendants named in said bill, afterwards plaintiffs in the suit now before this Court were non-residents and were proceeded against by order of publication. The Circuit Court of Nicholas County affirmatively held that "the order of publication duly executed as to the defendants

who are non-residents and have been regularly proceeded against as such" (R. 36). It will be noted that the decree quoted from above is brought on further "upon the bill and its exhibits duly filed at rules, the *decree nisi* properly taken thereon and regularly set for hearing by the plaintiff; upon the affidavit filed herein for an attachment; upon the attachment issued herein, the levy thereof and return thereon made by the officer levying the same; and upon the arguments of counsel", etc. (R. 36). The decree then finds judgment in favor of the plaintiff against said W. B. Stephenson for $34,285.60, with interest from the date of the decree until paid. The decree then, continuing, says:

> "And it further appearing to the satisfaction of the Court *from the papers and evidence in this case* that the said deed from W. B. Stephenson and Sarah Stevenson, his wife, to John W. Stevenson, Emma S. Thomson, Jennie Stephenson and Mary S. Weimer, bearing date the 26th day of February, 1908, conveying to John W. Stephenson three-twelfths of a one-fourth undivided interest, to the said Emma Thomson three-twelfths of a one-fourth undivided interest, to the said Jennie Stephenson one-sixth of an undivided one-fourth interest, and to the said Mary S. Weimer one-sixth of an undivided one-fourth interest in the several tracts of land described in said deed and the deed from W. B. Stephenson and Sarah W. Stephenson, his wife to Emma S. Thomson, bearing date on the 12th day of January, 1911, conveying the one-twenty-fourth interest in the lands therein described, were made to hinder, delay and defraud the creditors of the said W. B. Stephenson, and especially the plaintiff,

F. E. Cawley, in respect to the debt and demand herein adjudged to said plaintiff, it is therefore further adjudged, ordered and decreed that the said deeds, bearing date as aforesaid, be and the same are hereby set aside and held for naught, but so far only as the said debt and demand of said plaintiff, F. E. Cawley, is concerned." (R. 36.)

(Italics are ours.)

The same decree, continuing, says:

"And it further appearing to the Court that this is a proceeding by order of publication and attachment of the property of the said defendant found in this County, without any personal service on the said defendants, and the said defendants not having entered their appearance in this action, the Court doth not enter any personal decree against the said W. B. Stephenson; but doth find and doth adjudge, order and decree that the property of the said defendant, W. B. Stephenson, levied on of said attachment is liable to the payment of the said sum of $34,285.60, with interest thereon from this date until paid, and the costs of this suit and attachment issued herein."

The decree then finds that said attachment had been levied on certain real estate, which is the same real estate set out in appellants' bill and the exhibits therewith, said real estate being fully described in said decree.

The decree then further recites:

"All the above described property belonging to the said defendant, W. B. Stephenson, and having

> been levied on to satisfy the plaintiff's said debt and demand; and it appearing to the satisfaction of the Court that the property is still under the levy of said attachment and is liable to the payment of said debt and claim of the plaintiff, it is therefore adjudged, ordered and decreed that the said W. B. Stephenson do pay unto the said F. E. Cawley within thirty days from the rising of this court the said sum of $34,285.60, with legal interest", etc., * * * * "and in default thereof the said property, or so much thereof as may be necessary to be sold to pay the plaintiff's said debt and interest thereon", etc. (R. 38.)

The decree then proceeds to appoint special commissioners to make sale of said real estate in case of default, prescribes the terms and conditions of sale, requires that bond be given by said special commissioners before making sale, and in addition thereto requires that a further bond shall be given by the plaintiff. The provision in said decree respecting such further bond is as follows:

> "And it is further adjudged, ordered and decreed that before said sale be made, the said plaintiff or someone for him, shall give bond with sufficient security before the Clerk of this Court in the penalty of $30,000.00, conditioned that the plaintiff will perform such future order as may be made by the Court in this suit in case the said defendants shall hereafter appear and make defense herein within the time prescribed by law". (R. 39).

At this point it is well to state that the plaintiff did

give the $30,000.00 bond required, which bond, after being kept in full force and effect for the time prescribed by law, was, no appearance having been made by the defendants, finally discharged (R. 41, 43).

Said real estate was duly sold by the commissioners appointed for that purpose, the sale confirmed, purchase money all paid, and deed executed to the purchasers (H. L. Kirtley and H. W. Herold, appellees herein), said deed recorded, and said cause finally ended, including the discharge of plaintiff's bond as aforesaid and stricken from the docket.

At no time did the defendants, or any of the defendants, make any appearance or make any attempt to appeal said cause, nor did they file a petition for review or take any action which might have been taken to have the action of the Circuit Court of Nicholas County reviewed or passed upon on appeal.

The real estate in question sold for more than the plaintiff's debt and interest, costs of suit, costs of attachment, etc., and the surplus was reported to the Court and deposited under the direction of the Court, and we presume is still on deposit. (R. 44.)

The sale of said real estate was made on the 18th day of May, 1921, (R. 39), was confirmed at the May Term, 1921, although the record while setting out the decree of confirmance, fails to give the date of its entrance (R. 41-42). A deed was executed by said commissioners dated the 18th day of May, 1923 (R. 78). All of the purchase money would have been paid sooner and deed executed except for the loss of the purchase money notes given by appellee, Kirtley and Herold, whereby said purchasers refused to pay the balance of the purchase money until the notes were delivered cancelled or pro-

vided for by a decree of the Circuit Court, which was done. (R. 43.)

It will be noted that this suit in the District Court of the United States was instituted July 2, 1923, more than two years after the sale of the real estate (R. 39); more than three years after the institution of said chancery cause in the Circuit Court of Nicholas County (R. 26) and several months after the execution and recording of the deed to appellees (R. 78), and approximately two months after the discharge of the plaintiff's bond (R. 43).

The further statement of appellees that they own certain undivided interests of the undivided interest of W. B. Stephenson and that same was purchased by W. B. Stephenson "with funds belonging to himself and his five brothers and sisters" may of necessity and as a matter of law be taken as true on the pleadings, the District Court in this case having sustained a motion to dismiss plaintiff's bill, but if such statement in fact is true, then such fact was not known to appellees and contrary to the finding of the Circuit Court of Nicholas County. The same is true as to the further recitals of the transactions between said Stephenson and his brothers and sisters as set out in appellants' statement.

Appellants say that "shortly after W. B. Stephenson so took title in his own name, he, on December 3, 1902, executed and delivered to his said brothers and sisters named above a declaration of trust, which discloses the uses for which he held such title and the real interests of the plaintiffs as the same were then held and as herein stated". But appellants fail to state that said declaration of trust was never recorded in the County Court Clerk's office of Nicholas County, and was not a matter

of record at the time of the proceedings in the Circuit Court of Nicholas County, and that these appellees had no notice, either constructive or actual, of the existence of such a paper, if the same did in fact exist.

The further statements as to the transactions of the appellants amongst themselves as to their residence and as to a certain action in the Court of Common Pleas of Clearfield County, Pennsylvania, are all based upon the allegations in the appellants' bill, such allegations not being sustained by any evidence, as no proof has been taken on the bill in this cause. Appellees, however, are aware of the fact that upon the motion to dismiss the material allegations of the plaintiffs' bill in this cause are taken as true.

Appellants' statement then takes up certain questions respecting the suit in the Circuit Court of Nicholas County and says: "The order of publication in the caption thereof and in styling the case contains the name of Emma Thomas as a defendant, instead of Emma Thomson, which was doubtless intended". This is true as to the caption only of the order, Emma Thomson being correctly described in the order itself and being the person required to appear in response to said publication. It has been said and is stated by the appellants that all of the other parties named in the order of publication are brothers and sisters, and, therefore, Emma Thomson could not possibly be prejudiced by the wrong designation in the caption, as she, no doubt, was notified by her brothers and sisters, and it has been seen she was ordered to appear in her proper name in the body of the order.

Appellants in their statement next say "There is no evidence in the record of the posting of the order of publication". While this is true, the Court's attention is

called to the fact that there is no evidence that the same was not posted, and it will be hereinafter shown that under the law of West Virginia there is a presumption of law that it was duly posted. The attention of the Court is also called to the fact that the Circuit Court of Nicholas County affirmatively found that the order of publication had been duly executed (R. 36). As a matter of fact the notice was posted as well as published, notwithstanding the record's silence on this point. We know of no provision for making the posting a matter of record, and it seems that the several Circuit Courts of West Virginia have different rules as to proof of such posting, etc. This matter, however, is amply taken care of in the presumption referred to.

Appellees deny the statement that "the affidavit for the order of attachment is insufficient; and the order of attachment does not direct or authorize its levy upon the property or estate of either of the plaintiffs, who then owned and held the title to said interest in said lands; but directs the attaching of the estate of plaintiff, W. B. Stephenson, who had been before that time divested of all right or title to the lands in question", but maintain that the affidavit is proper and sufficient and in accordance with the law of West Virginia, and while the affidavit is properly directed against the real estate of W. B. Stephson, the judgment debtor of plaintiff, and while said real estate was attached as his property, the Circuit Court of Nicholas County upon the hearing of said chancery cause set aside the deeds made by W. B. Stephenson as heretofore set out, held that said real estate was the property of W. B. Stephenson, held that the order of attachment was levied on the identical real estate which was sold, and also held that the same belonged to W. B. Steph-

enson and had been levied on to satisfy the plaintiff's debt and demand and that at the time of directing sale "the property is still under the levy of said attachment and is liable to the payment of said debt and claim of plaintiff". (R. 36, 37, 38).

Appellees' statement next says, "A decree (R. 36) was rendered in said cause by the Judge of the Circuit Court of Nicholas County upon the bill and exhibits alone and without evidence touching the allegation of fraud", etc. While appellees contend that if such statement were a fact it could be only taken advantage of on appeal, nevertheless the decree referred to shows such statement to not be a fact, because the decree says, "And it further appearing to the satisfaction of the Court from the papers and evidence in this case that the said deed from W. B. Stephenson * * * * were made to hinder, delay and defraud the creditors of the said W. B. Stephenson, and especially the plaintiff, F. E. Cawley". (R. 36).

At this point we will also call the attention of the Court to the fact that the plaintiff's bill in the Circuit Court of Nicholas County was sustained by exhibits of the transcripts of the judgments of the plaintiff, Cawley, showing the dates of the institution of the suits and rendition of judgments, and the date of the execution of the notes on which said judgments were predicated and copies of the deeds from the defendant, W. B. Stephenson, to his brothers and sisters were likewise exhibited, and the Court, in addition to other evidence, no doubt took into consideration the fact that said deeds were made to the brothers and sisters, as to one deed about the time of the execution of the notes, and as to the other deed about the time of the institution of suit on the notes in the State of Pennsylvania. The notes were dated Feb-

ruary 7, 1908. The deed from W. B. Stephenson to John W. Stephenson and others was dated February 26, 1908. The first suit of Cawley instituted in Pennsylvania was in February, 1911, and the deed of W. B. Stephenson to Emma S. Thomson was dated January 12, 1911. Appellees contend, however, that the question as to the amount and character of the evidence before the Circuit Court of Nicholas County is not subject to attack in this suit, as will be hereafter shown.

The statement in appellants' brief that "the plaintiffs here had no knowledge of the suit in the Circuit Court of Nicholas County or of the proceedings had therein, until more than two years after the entry of the final decree of sale and the decree of confirmation" is strenuously denied, as appellees are in position, we believe, to affirmatively prove that at least a portion, if not all, of the appellants had actual knowledge of the chancery cause in Nicholas County before the expiration of two years, but we do not see where this matter can be considered in this cause. The law of West Virginia allows two years in which defendants proceeded against by order of publication, as in the cause in the Circuit Court of Nicholas County, can appear and defend their rights, and such limit is based upon constructive knowledge, and not actual knowledge.

It is, of course, true that this suit was instituted in the District Court of the United States for the Southern District of West Virginia in July, 1923, more than two years after the final ending of the suit in the Circuit Court of Nicholas County, and that this suit is an independent suit brought for the purpose of declaring absolutely void all of the proceedings had by the Circuit Court of Nicholas County.

In conclusion, that while many of the details of the chancery cause in Nicholas County and of this suit subsequently brought have been set forth at least in appellants' statement and in this reply, nevertheless the one point to be determined and, in our opinion, the only pertinent point, is whether the Circuit Court of Nicholas County acquired jurisdiction of the subject matter of said suit and if found affirmatively, as we believe it will be so found, then all other questions raised by appellants are of no avail in this suit, because while they might have been taken advantage of upon an appeal of the chancery cause in Nicholas County, they can not be now considered collaterally by this Court.

STATUTES.

In addition to the statutes quoted by appellants, we feel that the following statutes of West Virginia have or may have some application to the questions in this cause and are, therefore, quoted for the benefit of the Court.

Section 1, chapter 74 Barnes' Code:

> "Acts void as to creditors; *bona fide* purchasers. —Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given, with intent to delay, hinder, or defraud creditors, purchasers, or other persons, of or from what they are or may be lawfully entitled to, shall as to such creditors, purchasers, or other persons, their representatives or assigns, be

void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

Sec. 2, chapter 133 Barnes' Code:

"Suits to annual fraudulent transfers; relief.—A creditor, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment, or transfer of, or charge upon, the estate of his debtor, which he might institute after obtaining such judgment or decree, and he may in such suit have all the relief in respect to said estate, which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover."

Sec. 1, chapter 123 Barnes' Code:

"Venue in general.—Any action at law or suit in equity, may hereafter be brought in the circuit court of any county: (1) Wherein any of the defendants may reside, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered or some part thereof is; or (2) if a corporation be a defendant wherein its principal is, or wherein its mayor, president or other chief officer resides; or if its principal office be not in this state, and its mayor, president, or other chief officer do not reside therein, wherein it does business; or (3) if it be to recover land or subject it

to a debt wherein such land or any part thereof may be; or (4) if it be against a non-resident of the state wherein he may be found, or may have estate or debts due him; * * * *."

Sec. 11, chapter 124 Barnes' Code:

"Service by publication.—On affidavit that a defendant is not a resident of this state; or that diligence has been used by or on behalf of the plaintiff to ascertain in what county he is, without effect; or that process, directed to the officer of the county in which he resides or is, has been twice delivered to such officer more than ten days before the return day, and returned without being executed; or that the defendant is a corporation, and that no person can be found in the county upon whom the process can be legally served, an order of publication may be entered against such defendant. And in any suit in equity, where the bill states that the names of any persons interested in the subject matter to be divided or disposed of are unknown, and makes such persons defendants by the general description of parties unknown, on affidavit of the fact that the said names are unknown, an order of publication may be entered against such unknown parties. Any order under this section may be entered either in court or at rules. In a proceeding by petition, there may be an order of publication in like manner as in a suit in equity."

Sec. 1, chapter 106 Barnes' Code:

"Grounds; affidavit; order by clerk; execution

of writ; attachment in equity; debts not due; foreign corporations; non-residents.—When any action at law or suit in equity is about to be or is instituted for the recovery of any claim or debt arising out of contract, or to recover damages for any wrong, the plaintiff at the commencement of the action or suit, or at any time thereafter and before judgment, may have an order of attachment against the property of the defendant, on filing with the clerk of the court in which such action or suit is about to be or is brought, his own affidavit or that of some credible person, stating that the nature of the plaintiff's claim and the amount, at the least, which the affiant believes the plaintiff is justly entitled to recover in the action or suit, and also that the affiant believes that some one or more of the following grounds exist for such attachment: (1) That the defendant, or one of the defendants, is a foreign corporation, or is a non-resident of this state", * * * * * * * * *

The order shall be issued by the clerk, and may be in form or effect as follows:

'A____B____, Plaintiff,)
vs. : Order of Attachment.
C____D____, Defendant.)

The plaintiff in this case having filed his affidavit as required by law, the sheriff of the county of --------, or constable of any district therein, to whom this order may come, is required, in the name of the state of West Virginia, to attach the estate of the defendant, C_____ D_____, sufficient to pay the sum of -------- (the amount the affiant states the plaintiff is justly entitled to re-

cover) and the costs of this suit, and make return of his proceedings under this order to the next term of the _____ court (or at rules to be held for the _____ court on the __ day of _____, naming in either case the court in which the action is brought).

Witness E_____ F_____, clerk of said court, this ____ day of _____.

E_____ F_____, Clerk.'

And such attachment may be sued out in a court of equity for a debt or claim, legal or equitable, whether the same be due or not upon any of the grounds aforesaid, but the affidavit in case the claim or debt be not due, must show when it will become due: Provided, That an attachment shall not be sued out against a foreign corporation, nor against a non-resident defendant for a debt not due, unless the affiant shows by his affidavit that such defendant was a resident of this state when the debt was contracted, and that the plaintiff believed he would remain a resident of this state at the time he gave the defendant credit."

Sec. 7, chapter 106 Barnes' Code:

"Return of officer; description of property.—The officer serving the attachment shall make return of the time and manner of service on each person designated as being indebted to, or having in his possession, the property of any such defendant; and shall also return a list and description of the property taken (if any) under such attach-

ment, and likewise the date of the service, or execution thereof on each person and parcel of property."

Sec. 9, chapter 106 Barnes' Code:

"Lien of attachment.—The plaintiff shall have a lien, from the time of the levying of such attachment, or serving a copy thereof, as aforesaid, upon the personal property, choses in action, and other securities of the defendant against whom the claim is, in the hands of, or due from any such garnishee, on whom it is so served, and on any real estate levied on by virtue thereof, from the suing out of the same. But if no bond be given by the plaintiff, and such personal property, choses in action, or other securities of the defendant, or any part thereof, be sold or disposed of for a valuable consideration, the lien or the attachment thereon shall cease and determine from the date of such sale or disposition."

Sec. 17, chapter 106 Barnes' Code:

"Order of publication.—When any attachment, except under the third section, is returned executed, an order, as prescribed in chapter one hundred and twenty-four, shall be made against the defendant against whom the claim is, unless he has been served with a copy of the attachment or with process in the suit in which the attachment issued."

Sec. 19, chapter 106 Barnes' Code:

"Contest of right to attachment; trial; judg-

ment on merits; costs.—The right to sue out an attachment may be contested, and when the court is of opinion that the facts stated in the affidavit were not sufficient to authorize the issuing thereof, or that the affidavit is otherwise insufficient, judgment shall be entered that the attachment be quashed. If the defendant desire to controvert the existence of the grounds for the attachment stated in the affidavit, he may file a plea in abatement denying the existence of such grounds, and the issue on such plea shall be tried by a jury, unless the same be waived by the parties. The affirmative of such issue shall be with the plaintiff; and if he fail to prove to the satisfaction of the jury, the existence of the grounds denied by the defendant, the verdict shall be for the defendant, and judgment shall be entered that the attachment be abated. But the court may grant new trials as in other cases. When the attachment is properly sued out, and the case heard upon its merits, if the court be of opinion that the claim of the plaintiff is not established, final judgment shall be given for the defendant. In either case the defendant shall recover his costs, and there shall be an order for the restoration to him of the attached effects."

Sec. 20, Chapter 106 Barnes' Code:

"Order of sale.—If the claim of the plaintiff in any suit or proceeding under this chapter be established, judgment or decree shall be rendered for him, and the court shall order the sale of any real estate levied upon under and by virtue of any

such attachment, which shall not have been previously sold or replevied under this chapter, and direct the proceeds of the sale of such property and whatever else the attachment has been levied upon, including what is embraced by such replevy or forthcoming bond, to be applied in satisfaction of said judgment or decree. But no real estate shall be sold under such order until all other property and money so levied on as aforesaid, has been exhausted, and then only so much thereof as is necessary to pay the judgment or decree."

Sec. 21, chapter 106 Barnes' Code:

"Attachment sale.—When a sale of real estate is so ordered, the court shall prescribe in the order the terms of such sale and the officer or person by whom it shall be made. The officer or person making such sale of real estate, shall report to the court which ordered the sale, the real estate so sold by him, with the name of the purchaser, the sum for which it sold, and the time and place of such sale. The court for good cause, may refuse to confirm the sale, and order the property to be resold; but if good cause for setting the sale aside be not shown, the court shall confirm the sale, and shall direct a deed of conveyance of the real estate so sold, to be made to the purchaser thereof, by the officer or person who sold the same, or by a special commissioner, appointed for that purpose, whenever the purchase money thereof, with its interest, shall have been fully paid. An officer heretofore or hereafter directed by the court to make such conveyance, may make the same in his of-

ficial character, notwithstanding his term of office shall have expired."

Sec. 22, Chapter 106 Barnes' Code:

"Bond for such sale.—But if the defendant whose real estate is attached has not appeared in the action or suit, or been served with a copy of the attachment sixty days before such judgment, decree, or order, no sale of the real estate so attached shall be made until the plaintiff or some one for him, shall give bond, with sufficient security, in such penalty as the court shall approve, with condition that the plaintiff will perform such future order as may be made by the court in the action or suit, in case the defendant appear and make defense therein within the time prescribed by law: Provided, That after the right of a defendant to appear and make defence in any such action or suit shall have expired by limitation or otherwise, as prescribed in this chapter, a sale of such real estate may be made under the judgment, order or decree, whether such bond has been given or not. If personal property be levied upon, and ordered to be sold, where there has been no such appearance or service of the attachment, as aforesaid and no bond has been given by the plaintiff as provided in section six of this chapter, the court shall require such bond to be given by the plaintiff, and if the plaintiff, or some one for him, fail to give such bond within a reasonable time, the court shall dispose of such property, or the proceeds thereof, as to it shall seem just."

Sec. 25, chapter 106 Barnes' Code:

"Rehearing, after judgment or decree on publication.—If a defendant against whom, on publication, judgment or decree has been or shall hereafter be rendered, in an action or suit in which an attachment has or may be sued out and levied as provided in this chapter, or his personal representatives, shall return to, or appear openly in this state, he may, within one year after a copy of such judgment or decree has been or shall be served upon him, at the instance of the plaintiff, or within two years from the date of such judgment or decree, if he be not so served, petition to have the proceedings reheard. On giving security for the costs which have accrued and shall thereafter accrue, such defendant shall be admitted to make defense against such judgment or decree, as if he had appeared in the case before the same was rendered, except that the title of any *bona fide* purchaser to any property, real or personal, sold under such attachment, shall not be brought in question or impeached. But this section shall not apply to any case in which the petitioner, or his decedent, was served with a copy of the attachment, or with process in the suit wherein it issued more than sixty days before the date of the judgment or decree, or to a case in which he appeared and made defense: Provided, that if such judgment or decree was made before this section as amended takes effect, such petition may be filed within the time prescribed by law at the time such judgment was rendered or decree pronounced."

Sec. 26, chapter 106 Barnes' Code.

"Proceedings on re-hearing or new trial.—On any re-hearing or new trial had under the preceding section of this chapter, if the judgment or decree be for the defendant, the court may order the plaintiff in the original suit or his personal representative, to restore any money paid him under his judgment or decree therein, with interest from the date of such order, to the defendant, or his personal representative, entitled thereto, and may enter a judgment or decree against him therefor; and if the defendant or his personal representative, fail to recover on such re-hearing or new trial, the original judgment or decree shall be confirmed; and in either case the costs shall be adjudged to the prevailing party."

Sec. 1, chapter 132 Barnes' Code:

"Decree or order for sale of property; terms; special commissioner or receiver.—A court in a suit, pending properly therein, may make a decree or order for the sale of property in any part of the state, and may direct the sale to be for cash, or on such credit and terms as it may deem best; and it may appoint a special commissioner or special receiver to make such sale."

Sec. 4, chapter 132 Barnes' Code:

"Execution of deed by commissioner.—A court of law or equity, in a suit in which it is proper to decree or order the execution of any deed or writing, may appoint a commissioner to execute the

same; and the execution thereof shall be as valid to pass, release, or extinguish the right, title, and interest of the party on whose behalf it is executed, as if such party had been at the time capable in law of executing the same and had executed it."

Sec. 8, chapter 132 Barnes' Code:

"Reversal of decree of sale; effect on title; restitution of proceeds.—If a sale of property be made under a decree or order of a court, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be restitution of the proceeds of sale to those entitled."

Sec. 8a, chapter 132, Barnes' Code:

"Presumption or jurisdiction and regularity as to sales.—(1) When land or any interest in land in this state has heretofore been sold, partitioned or disposed of prior to the formation of this state, under the order, judgment or decree of any court of competent jurisdiction of the state of Virginia, or has heretofore been or shall hereafter be sold, partitioned or disposed of under the order, judgment or decree of any court of competent jurisdiction of this state, it shall be presumed, in the absence of evidence to the contrary, that every such court obtained jurisdiction in the cause by the institution of proper process over any and all persons whose names appear in any part of the record of the cause as persons embraced therein or against whom

the court proceeded, and this presumption shall apply to any person or persons named by the designation of child, children, heir-at-law, heirs-at-law, devisee, devisees, or other sufficient designation or classification from which it can be shown by the record or otherwise the person or persons included therein or intended thereby.

(2) When any deed has heretofore been made prior to the formation of this state for land or any interest in land therein, which purports on its face to be made under judicial proceedings of a court of the state of Virginia by a commissioner, special commissioner, guardian or other person, or when any deed has heretofore been made or shall hereafter be made for land or any interest in land in this state which purports on its face to be made by a commissioner, special commissioner, guardian or other person under the judicial proceedings of a court of this state, then in every such case it shall be presumed, in the absence of evidence to the contrary, that the person executing such deed was authorized by the court to convey the land or interest therein which is conveyed by such deed."

APPELLANTS' ASSIGNMENT OF ERRORS.

Appellants in their brief make no specific assignment of errors, but we find an assignment of three errors in the record (R. 92).

As to the first, the appellees maintain that the United States District Court committed no error in sustaining the motion of defendants to dismiss the bill herein, but, on

the other hand, took the only possible action justified by the law and decisions applicable to this cause.

As to the second assignment, appellees contend that the United States District Court in this cause had no right to review the action of the Circuit Court of Nicholas County, but was restricted to the single question of the jurisdiction of the Circuit Court of Nicholas County, which jurisdiction was affirmatively found in favor of that Court. Appellees see no ground for the contention that appellants were denied due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The third assignment of error is practically covered by the first and second, except that it is contended that the action of the Circuit Court of Nicholas County was made "without hearing any evidence upon said question and without any service of process upon your petitioners or either of them." The decree of the Circuit Court of Nicholas County affirmatively states that the same was based on the evidence and the record discloses the bill filed, sustained by numerous exhibits, from which the similarity in dates as to the execution of notes, institution of suits, and the execution of the deeds as hereinbefore referred to in the statement, would at least raise a presumption of fraud. The affidavit for attachment also sets forth certain facts, duly verified. The record does not show that there was not other evidence before the Court which may have been given orally in open court or in chambers, while the decree itself affirmatively states that the same was rendered on the evidence. Appellees contend that the question of the amount and sufficiency of the evidence, or even of the evidence itself, is not a matter going to the jurisdiction, and therefore not a matter sub-

ject to collateral attack. If there was no evidence, the decrees of the Circuit Court of Nicholas County might be voidable, but if the Circuit Court of Nicholas County acquired jurisdiction under the order of publication and attachment, its decrees are not void.

The statement in the third assignment that the same was "without any service of process upon your petitioners or either of them" is not sustained by the record.

STATEMENT OF THE POINTS OF LAW AND FACT PERTINENT TO THIS CAUSE.

1. The Circuit Court of Nicholas County had jurisdiction:

(a) *By order of publication independent of the attachment;*

(b) *By order of publication and attachment of the property sold to satisfy plaintiff's debt.*

2. The Circuit Court having acquired jurisdiction, its decrees are not void but merely voidable:

(a) *Advantage of errors can be taken only by appeal or appearance within the time allowed under the statute;*

(b) *Jurisdiction once acquired the action of the Circuit Court of Nicholas County is not subject to collateral attack;*

(c) *The United States District Court for the Southern District of West Virginia is a court of concurrent jurisdiction with the Circuit Court of Nicholas County, West Virginia, and has no appellate powers nor jurisdiction to review the action of the Circuit Court of Nicholas County.*

3. Appellees, H. L. Kirtley and H. W. Herold, were not parties to the suit in the Circuit Court of Nicholas County, but merely purchasers of property under the decrees in that suit. That suit having finally ended before the institution of the suit in the United States District Court, there was no lis pendens as to them and their purchase became final:

(a) *Said Kirtley and Herold in any event should be protected in their purchase;*

(b) *Any issues raised in the suit now pending and decrees thereon should be restricted to the fund arising from said sale, and should not be permitted to affect the title of appellees, Kirtley and Herold, at this time.*

4. The point raised by appellants that the decrees of the Circuit Court of Nicholas County should be held void because not sustained by the evidence is not well taken:

(a) *Such question is not subject to collateral attack;*

(b) *The record and recitals in the decrees disclose that there was evidence before the Court;*

(c) *In the absence of affirmative proof to the contrary, the presumption of law is in favor of the jurisdiction of the Circuit Court of Nicholas County.*

ARGUMENT.

THE CIRCUIT COURT OF NICHOLAS COUNTY HAD JURISDICTION.

In a general way this question is the one and only question to be decided in this cause, although we have above subdivided the several questions which arise under this general proposition. Counsel for appellants seem to

take the same view, as under their brief they make the general proposition that the Circuit Court of Nicholas County did not have or acquire jurisdiction, and proceed to subdivide the several questions to be considered under their theory tending to establish their contention.

It is the contention of appellees, and appellants will not deny such contention, that if the Circuit Court of Nicholas County in the suit of *Cawley* vs. *Stephenson* and others acquired jurisdiction, then all errors committed would be voidable and not void, except that appellants seem to contend that even though jurisdiction was acquired the decrees of the Circuit Court of Nicholas County would be void because not sustained by the evidence.

It is the purpose of this argument to discuss the questions arising in substantially the same order as set out above and so far as the same can be logically done to answer the argument set out in appellants' brief.

(a) *The Circuit Court of Nicholas County Had Jurisdiction by Order of Publication Independent of the Attachment.*

By a reference to Section 2 of Chapter 133 of the Code of West Virginia, hereinbefore quoted in this brief, it will be seen that said statute gives concurrent jurisdiction in equity in all cases falling under the statute against fraudulent conveyances, and said section provides that "a creditor before obtaining a judgment or decree for his claim may institute any suit to avoid a gift, conveyance, assignment or transfer of or charge upon the estate of his debtor which he might institute after obtaining such judgment or decree, and he may in such suit have all the relief in respect to said estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover."

The suit in Nicholas County was a suit by a creditor who had judgments against W. B. Stephenson in the State of Pennsylvania and was brought for the purpose of setting aside certain conveyances and to subject the property to the payment of said judgments (R. 45-78).

Under our statute and the decisions of West Virginia, the Circuit Court of Nicholas County clearly had jurisdiction of this cause independent of the attachment issued therein.

In the case of *Watkins* vs. *Workman,* 19 W. Va. 78, the Court held as follows:

> "A foreign judgment is a debt and a suit in equity can be maintained on it to avoid a fraudulent or voluntary conveyance without first obtaining a judgment at law in this State under Section 2, Chapter 133 of the Code of 1868."

The decisions of the Supreme Court of West Virginia also hold that by the commencement of a suit authorized by said Section 2 of Chapter 133 of the Code a creditor obtains a lien upon the property proceeded against. This has been held in the case of *Murphy* vs. *Fairweather*, 72 W. Va. 14.

The sixth syllabus in said case reads as follows:

> "By the commencement of a suit authorized by Section 2 of Chapter 133 of the Code a creditor obtains a lien upon the property proceeded against and may have a receiver appointed if there is danger of loss or misappropriation thereof."

Judge Poffenbarger, in the opinion, says:

> "As the attacking party under these statutes has a lien for his debt he has after the commencement of his suit the requisite status of an applicant for the appointment of a receiver in case of the misappropriation or loss of property upon which his lien is. Without the statute, equity might not have jurisdiction, and there would be no basis for a receivership."

The same thing has been held in the case of *Gilbert* vs. *Peppers,* 65 W. Va. 355. The Court in that case held as follows:

> "A general creditor who first attacks a fraudulent conveyance obtains a lien on the property by the institution of his suit and preferences among all of such creditors are determined by the dates of the commencement of their suits, if separate suits are brought, or of the commencement of the suit and the filing of petitions, if all assert their rights in the same suit."

The same thing has been held in the case of *Dent* vs. *Pickens,* 59 W. Va. 274, and in *Moore* vs. *Tierney,* 62 W. Va. 72, and in numerous other West Virginia cases.

Thus we see F. E. Cawley, plaintiff in the suit in Nicholas County, had obtained various judgments against W. B. Stephenson in Pennsylvania and instituted a suit in the Circuit Court of Nicholas County for the purpose of setting aside as fraudulent certain conveyances made by W. B. Stephenson of real estate in said County and to subject said real estate to the payment of said judgments, and under our decisions, hereinbefore set out, he obtained a

lien upon said real estate by the institution of said suit. Attorneys for the plaintiff in this suit seem to lose sight of the fact that equity has jurisdiction of a suit such as the suit that was instituted in the Circuit Court of Nicholas County and that it was not necessary for an attachment to issue, and that, even if an attachment was issued and is for any reason void, the jurisdiction of the Court still stands and the decrees and orders which were entered in said suit are perfectly legal and valid. There are various decisions of our Supreme Court which clearly make the distinction between cases where the jurisdiction of the court depends wholly on the attachment and where the court would have jurisdiction regardless of an attachment.

In the case of *Goshorn's Executor* vs. *Snodgrass*, 17 W. Va. 717, 777, Judge Haymond, in the opinion, says:

> "Thus far I have said nothing as to the validity of the attachment issued in this cause, and as to whether the Circuit Court erred in refusing to quash the said attachment or not, because I am of opinion, that the court had jurisdiction of this case without an attachment, because of the fraud alleged in the bill; that the jurisdiction of the court in the case does not depend solely upon the attachment and levy thereof; that the case as made by the bill shows sufficient equity as to matter of fraud to give jurisdiction to a court of equity to set aside said sales and conveyances of the land in the bill mentioned for fraud as to the creditors of said defendant Snodgrass."

In the case of *Danser* vs. *Mallonee,* Judge Miller, in the opinion, says:

> "According to these decisions, though the original attachment and the return on the original process, to answer the action, may have been properly quashed, plaintiff was entitled to retain the action on the docket for new process and attachment, and it would have been error for the court to have denied him that right. See Section 1, Chapter 106, Code 1913. This case is not like a suit in equity on a claim not due and when jurisdiction in equity depends solely upon the validity of the attachment. In such cases, according to our decisions, the suit falls with the attachment and the bill is properly dismissed."

In the suit in Nicholas County the claim of F. E. Cawley was past due and the jurisdiction in equity, therefore, did not depend upon the validity of the attachment.

As we understand these decisions, in a case where the claim is due equity has jurisdiction without attachment and the creditor obtains a lien upon the property by the institution of his suit.

In the case of *Tennant's Heirs* vs. *Fretts,* 67 W. Va. 569, the Court held:

> "The statute (§§ 11, 12 and 13, Chap. 124, Code 1906) providing for service on a non-resident by publication, or by personal service out of the State, can not authorize the rendition of a personal judgment, or decree, against a non-resident so served; but it does authorize any court, whether of law or equity, to pronounce a judgment or decree binding *in rem,* in any case in which such court would otherwise be competent to do so if the defendant

were personally served within the State.

Equity may, upon service of process on a non-resident by publication, remove cloud from title to land within its jurisdiction by decree, binding only *in rem.*"

In the case of *Birch* vs. *Covert,* 83 W. Va. 752, the Court held:

"A vendee may maintain a suit against a non-resident vendor of land in this State in the county where the land is, on order of publication, and where no specific acts or covenants are required to be performed by the vendor other than execution of a deed conveying the legal title, the court may grant relief by a decree in the nature of a decree *in rem* appointing a special commissioner to convey the legal title."

In the case of *Witten* vs. *St. Clair,* 27 W. Va. 762, the Court held:

"In an action of ejectment to recover land situate in this State, if the defendant be a non-resident he may be proceeded against by order of publication, or the declaration and notice may be served upon him outside of the State in the manner prescribed by Section 13, Chapter 124 of the Code, and either mode of service will confer jurisdiction upon the forum *rei sitae* to determine the ownership of the land in controversy."

In the case of *Adams* vs. *Cowles,* 95 Mo. 501, the Court held:

"A suit to set aside a deed as being in fraud of

creditors, is one for the establishment of a right to real property within the meaning of the statute (R. S. § 3494) authorizing, in such case, service of notice by publication on non-resident defendants."

In the case of *McLaughlin* vs. *McCrory,* 55 Ark. 442, 29 A. S. R. 56, the Court held:

"A state possesses the power to provide for the adjudication of land titles within its limits, as against non-residents who are brought into court only by publication, even though a court of equity where the defendant is found might be competent to force him to execute a release of his claim of title.

Courts of equity may be empowered by statute to annul deeds for fraud, and to establish titles to lands within their jurisdiction by mere force of their decrees, and to that extent their action is *in rem.*

A suit in equity to cancel a deed for fraud is, under the Arkansas statute, a proceeding *in rem,* and may be prosecuted against a non-resident by publication of summons."

In the case of *Quarl* vs. *Abbett,* 102 Ind. 233, 52 Am. Reps. 662, the Court held:

"A judgment setting aside a fraudulent transfer of corporate stock by a non-resident may be rendered upon constructive service of process, and it is not essential that the creditor should first obtain judgment on his demand."

This question seems to have been definitely settled by

this Court in the case of *Arndt* vs. *Griggs,* 134 U. S. 316, 33 L. Ed. 918. In that case the Court held:

> "A state has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication.
>
> The procedure established by the State in this respect, is binding upon the Federal courts.
>
> The disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated.
>
> The court can acquire jurisdiction to quiet title by constructive service against non-resident defendants by publication where the statutes of the state provide for and allow such mode of service in such cases."

Mr. Justice Brewer, in delivering the opinion of the Court, cites with approval the case of *Adams* vs. *Cowles, supra.*

We submit, therefore, that, even if the Court should be of the oipnion that the affidavit for attachment is bad, and the attachment is void, still the Circuit Court of Nicholas County had jurisdiction of the case and in no event could the orders and decrees entered therein be void, but, at the worst, could be only voidable and can not be attacked collaterally in a suit of this kind.

But the appellants lay great stress upon the proposition that there was no completed substituted service of process as to the defendants, which proposition, if true, would make the point above discussed immaterial.

MISNOMER IN CAPTION OF ORDER OF PUBLICATION.

Appellants in their argument say that while there was an order of publication the caption sets forth the name of Emma Thomas, whereas her true name was Emma Thomson, and attempt to argue that this fact alone is sufficient to deny jurisdiction to the Circuit Court of Nicholas County as to any of the defendants in that suit. The defendants in that suit being the plaintiffs in the suit later brought in the United States District Court and now before this Court for review. At this point the attention of the Court is called to the fact that while one of the defendants is described as Emma Thomas in the caption of the order of publication as shown in the record, nevertheless she is properly described in the body of the order of publication and is further required to appear in her own proper name in the notice. This question was not raised in the United States District Court.

In this connection we desire to call the Court's attention to the case of *Grannis* vs. *Ordean*, 234 U. S. 383, 58 L. ed. 1363. Mr. Justice Pitney, in delivering the opinion of the court, says:

> "The trial court was of the opinon that the question turned upon whether 'Guillfuss' and 'Geilfuss', were *idem sonans*, and held that since 'Geilfuss' is evidently a German name, the first syllable must be pronounced with the long sound of 'i', while the first syllable of 'Guilfuss' would necessarily be pronounced with the short sound of 'i'. The Court therefore concluded that the names were not *idem sonans*, and that the difference was fatal. The Supreme Court agreed that 'Geilfuss' and 'Guilfuss'

were not *idem sonans,* but held that this was not the proper test; that where a summons is served by publication, the true test is not whether the name sounds the same to the ear when pronounced, but whether they look substantially the same in print (following Lane v. Innes, 43 Minn. 137, 143, 45 N. W. 4; D'Autremont v. Anderson Iron Co. (D'Autremont v. Gaylord), 104 Minn. 165, 17 L. R. A. (N. S.) 236, 124 Am. St. Rep. 615, 116 N. W. 357, 15 Ann. Cas. 114); and assuming that the name of the judgment creditor of McKinley was Albert B. Geilfuss, assignee, the court said: 'The question then is, placing the names 'Albert Guilfuss, assignee,' and 'Albert B. Geilfuss, assignee,' in juxtaposition, was there so material a change as to be misleading?' This was answered in the negative.

Were we to theorize, we might say that while each of these tests is helpful, neither is altogether acceptable if perfect accuracy were the aim; not the test of *idem sonans,* because it does not appear that all persons would necessarily pronounce Geilfuss with the long 'i', or Guilfuss with the short 'i'; and not the test of the appearance of the names as printed and placed in juxtaposition, because, in fact, as the names appeared in the summons published and mailed, it was 'Guilfuss' alone, without any name in juxtaposition to serve as a standard for comparison. *And we think both tests are inadequate if applied without regard to what was contained in the summons besides the mere name and addition, 'Albert Guilfuss, assignee'. The record, as it happens, contains no copy of the summons; but from findings and admissions that are*

in the record, we know that it was in due form, and therefore that it contained such notice of the commencement of the action and of its purpose, and such warning to appear and answer, as would constitute due process of law if served upon a defendant within the jurisdiction (Minn. Stat. 1894, §§ 5194, 5195); *and that it contained, inter alia, a brief description of the property sought to be divided* (Minn. Stat. 1894, § 5773, marginal note, *supra*). *The underlying question is a practical one,—whether, notwithstanding the misnomer, the summons as published and mailed, being otherwise unexceptionable, constitutes a substantial compliance with the Minnesota statute and sufficient constructive notice to the party concerned. In determining this, we need not confine ourselves to the test of idem sonans, nor to the appearance of the name in print, but may employ both of these, with such additional tests as may be available in view of what is disclosed by the record.* One such additional test, we think, is whether, when two letters reached the postoffice at Milwaukee, one addressed 'Albert Guilfess, assignee, the other addressed 'Albert B. Guilfuss,' they or either of them would, in reasonable probability, be delivered to Albert B. Geilfuss, then a resident of that city. *Another is whether, assuming that the summons as so mailed, or as published in Duluth, and containing the misspelled names or either of them, had come to the eye of the veritable Albert B. Geilfuss, or of any person knowing him by that name, and sufficiently interested in him to acquaint him with its contents if apprised that it was intended for him, the summons, as a whole, would probably have conveyed*

notice that Albert B. Geilfuss was the person intended to be summoned. Both of these questions are, we think, to be answered in the affirmative. In view of the well-known skill of postal officials and employees in making proper delivery of letters defectively addressed, we think the presumption is clear and strong that the letters would reach—indeed, that they did reach—the true Albert B. Geilfuss in Milwaukee. *And it seems to us that any person knowing him, and knowing the correct spelling of his name, and having reason to acquaint him with the contents of a notice of this character if supposed to be intended for him, would probably realize for whom such notice was intended, notwithstanding the name was spelled 'Guilfuss'.* The general resemblance between the names is striking, however they are to be pronounced. And the designation 'assignee' was an additional means of identification. That Geilfuss himself, upon receiving the notice, would be sufficiently warned that it affected his interest in the Minnesota lands under his judgments against McKinley, is free from doubt. He would, of course, observe the misnomer; but, having received the notice which it was the purpose of the law to convey to him, he could not safely ignore it on the ground of the mistake in the name, any more than, if personally served with summons within the state of Minnesota, he could have ignored it on account of a similar misnomer.

We conclude that there was due process of law in the partition suit, and that therefore the present judgment should be affirmed." (Italics are ours.)

The names of all the defendants in the caption of the

order of publication, except Emma Thomson, are spelled correctly and all of these defendants are either brothers or sisters of Emma Thomson. The object of the suit is fully set out in the order of publication (R. 27), and in setting out the object of the suit Emma Thomson's name appears correctly spelled and in the part of the order of publication in which the defendants are ordered to appear and protect their interests Emma Thomson's name is spelled correctly. We do not believe that the doctrine of *idem sonans* or the doctrine as to whether the names "Thomas" "Thomson" look substantially the same in print should be applied in this case, but that the whole order of publication should be looked to, and the test should be whether the order of publication as a whole would have conveyed notice that Emma Thomson was the person intended to be summoned, and we submit that, applying this test, there can be no doubt whatsoever in reference to this matter, and the case of *Grannis* vs. *Ordeans, supra,* holds that this is the proper test.

In reference to this point, appellants in their biref, on page 14, quote from 19 R. C. L., p. 1335. The part there quoted is part of paragraph 13, and leaves the impression that if substituted or constructive service of process is made under the wrong name the service will not be validated by resort to the doctrine of *idem sonans.* In order to correct any such impression we will quote the balance of said paragraph 13, which reads as follows:

> "Other courts take a more liberal view and apply the general doctrine of *idem sonans* to service by publication. Still other courts take the position that where the summons is served by publication, the true test should not be whether the names are

> strictly *idem sonans*—sound the same to the ear when pronounced—but whether they look substantially the same in print. *If the variation is not such as to mislead the defendant or his friends or acquaintances, it should not be held fatal."* (Italics are ours.)

Appellants cite several cases which apparently hold certain names are not to be *idem sonans.* We believe that just as many, if not more, cases could be cited wherein it was held that the doctrine of *idem sonans* did apply, and in this connection we call the Court's attention to 19 R. C. L., p. 1337, paragraph 17, which reads as follows:

> "Names Held *Idem Sonans.*—Among the names which have been held *idem sonans* are the following: 'Benani' and 'Benoni', 'Blunt' and 'Blount', 'Bobb' and 'Bubb', 'Conada' and 'Kennedy', 'Critz and 'Kreitz', 'Deadema' and 'Diadema', 'Dugald' and 'Dougal', 'Edmindson' and 'Edmundson', 'Edmond' and 'Ed', 'Edward' and 'Edwin', 'Faust' and 'Foust', 'Forris' and 'Farris', 'Johnson' and 'Johnston', 'Josier' and 'Josiah', 'July' and 'Julia', 'Kellier' and 'Kealiher', 'Meyer' and 'Maier', 'Penryn' and 'Pennyrine', 'Pillsby' and 'Pillsbury', 'Serelda' and 'Zerelday', 'Staunton' and 'Stanton', 'Tilter' and 'Tiller', 'Wilkerson' and 'Wilkinson.' "

POSTING OF ORDER OF PUBLICATION.

Another question raised for the first time, and which can be considered with the question above noted, is that the substituted service was not complete, because, admittedly published as required by the statute, appellants'

claim that there was no posting as also required, or, rather, that the record does not show affirmatively that the notice was posted.

The record is silent as to the posting of the order of publication. It is true that the statute does say, that an order of publication shall be published and shall be posted at the door of the court house of the county in which the court is held at least twenty days before the judgment or decree is entered, but while the same goes into details as to the manner of publication it designates no officer to post said notice and is silent as to the proof required of such posting. It seems from our investigation that the practice as to posting notices of publication is not uniform in the several circuits of West Virginia. In some circuits, the notices are usually posted by the clerk of the circuit court at the time an order of publication is granted. In other circuits it seems to be the practice for the publisher of the newspaper to post the notice and to include such fact in his certificate of publication, making the same read that the annexed notice was published for four successive weeks and was posted, while it is our understanding that in other circuits notices are posted by the attorneys concerned.

While it is true that the record does not affirmatively show that notice was posted, on the other hand there is no proof whatever in the record that the notice was not posted.

As to the posting of the notice of the order of publication it is the contention of appellees that under the decisions of West Virginia and this Court the presumption, on this issue, is in favor of the appellees, that the notice was posted, especially in view of the fact that the decree of the Circuit Court shows, that the order of publication was duly executed.

In fact appellants in their brief cite and rely on a case

which sustains the proposition contended for by the appellees.

Appellants' brief, page 8, says:

> "The subject of substituted service by order of publication was again before the Supreme Court of Appeals of West Virginia in the case of *Styles* vs. *Laurel Fork Oil & Coal Company,* 45 W. Va. 374, and Points 2 and 3 of the syllabus in that case read as follows: 'Where it does not appear from the record whether process was duly served, or order of publication duly published and posted, or not, except from the decree, which declares that "process was duly served" or "order of publication was duly executed as to the defendants" it will be presumed that it was so served or executed.' "

The above syllabus clearly sustains the proposition of appellees herein, but a further examination of the opinion in the case of *Styles* vs. *Laurel Fork Oil & Coal Company, supra,* is even stronger in favor of appellees, because by reference to the opinion, page 379, it will be seen that,

> "in the case at bar the record shows the order of publication, and shows that it was duly published and posted as to the defendants against whom it was taken, but it shows also upon its face that the defendant corporation was not included among the defendants who were ordered to appear. In the absence from the record of the process, in view of the declaration in the decree that 'process was duly served,' or that 'order of publication was duly exevuted,' the presumption would be that it was so; but when the process or order of publication, with

> the evidence of its service or execution is shown in the record, and from which it clearly appears that the order was not taken or published as to the defendant corporation, the decree raises no such presumption."

Again, on page 378, it will be seen:

> "No order of publication was awarded or published either against the defendant corporation or the 'unknown parties'. No process was served on the corporation and it entered no appearance."

Notwithstanding the fact that the party complaining had not been named, nevertheless, the court holds that, if it had not been for the proof that the order of publication was not published and posted as to the complainant, which fact affirmatively appeared in the evidence, the court would have held that the presumption arising from the recital in the decree, that order of publication was duly executed, would have prevailed.

Appellants also rely upon the case of *McCoy's Executors* vs. *McCoy's Devisees*, 9 W. Va. 443. In that case Moore, Judge, in the opinion, says:

> "In the record before us we find at February rules, 1867, a decree *nisi*, at the March rules the 'bill taken for confessed' followed decrees of the Circuit Court affecting the interest of absent defendants who have not been brought before the court in any way. But it is argued that 'the decrees recite that process was duly served.' The only decree that mentions the process is that of April 15, 1870, which recites that the cause came on

> to be heard 'upon the bill, exhibits, summons returned executed as to the home defendants, *and order of publication as to the absent defendants'*, etc. The decree does not state that the order of publication had been duly executed and is therefore not within the doctrine of Hunter's Executors vs. Spotswood, 1 Wash. 145, nor Gibson vs. White, 3 Munf. 94, on that point."

Thus it is clearly seen that this case is not in point with the case at bar, for the reason that the decree did not state that the order of publication had been duly executed.

Appellants also rely on the case of *Coal River Navigation Company* vs. *William H. Webb,* 3 W. Va. 438. In that case the Court held:

> "A mere recital in a decree that an order of publication was returned 'duly executed by publication in a newspaper,' etc., would not be sufficient in itself to establish it, if nothing else appeared in the papers of the cause to show how it had been executed."

Berkshire, Judge, in the opinion, says:

> "An objection is also urged by the appellants as to the proof of the proper execution of the order of publication, as well as to its regularity and validity. The decree complained of recites that the order of publication as to certain non-resident defendants was returned 'duly executed by publication in the *Kanawha Valley Star,* a newspaper in Kanawha County, West Virginia, for four succes-

sive weeks, commencing on the 13th day of August, 1860.

"If this were all the evidence in the record of the due execution of said order, it would be clearly insufficient, as it does not show a compliance with the statutory provision which then required that a copy of such order should also have been posted at the front door of the Court House of the County of Kanawha, on the first day of the next County Court after the order was entered.

"But by an affidavit of the publisher of said paper found in the record it appears that the order was duly published in the paper, as recited in the decree, and also that a copy of the same was posted by the said appellant, at the front door of said Court House, on the first day of the next County Court of said County after the order was entered. If there was no other objection to the order, therefore, there would, as I think, be no error in the decree, so far as it is founded on it, nothwithstanding the recital therein, as to the due execution of the order, would be insufficient in itself to establish it.

"But the order, it appears, issued on the 11th day of August, 1860, and was therefore neither issued in court nor at rules as required by the 11th Section of Chapter 170 of the Code of 1860, p. 708, and as the clerk had no authority under the law to issue it at that time, it follows that it was a nullity and ought to have been dismissed by the Circuit Court."

This case is not in point with the case at bar, for the reason that the decree did not state that the order of

publication had been duly executed and then stopped, but went further and explained that it had been duly executed by publication in the Kanawha Valley Star, a newspaper in Kanawha County, Virginia, for four seccessive weeks, commencing on the 13th day of August, 1860. In the case at bar the decree states "upon the order of publication duly executed as to the defendants, who are non-residents and have been regularly proceeded against as such," and the presumption from this recital in the decree is that the order of publication had been both duly published and posted.

In the case of *Craig* vs. *Sebrell*, 9 Gratt. 131, (Va.) the Court held as follows:

> "In a suit in which there is an absent defendant, the decree recites that the cause came on as to him upon the bill, etc., and order of publication duly executed. This is conclusive that the order was duly made, published in the newspaper and posted at the front door of the court house."

In the case of *Moore, et als.* vs. *Holt*, 10 Gratt. 284 (Va.), the Court held:

> "The decree states that the order of publication against the absent defendant had been duly published. It is to be taken in an appellate court that everything required by the statute was done."

Lee, Judge, in the opinion, says:

> "The next objection is, that there is no proof in the record to show that the order of publication against the alleged absent defendant had been duly executed as the law requires. The decree, how-

ever, states that the order of publication against Joseph Holt had been duly published and as due publication requires both the insertion of the order in a newspaper for the prescribed period and the posting of it at the court house door in due time the decree must be construed to import that both were done. And it has been decided by this court on several occasions that where the decree states that publication has been made, it will be sufficient, and this court will not look into the record for the evidence of the fact."

In the case of *Scott* vs. *Ludington,* 14 W. Va. 387, the Court held:

"But if there was no objection in the court below as to the manner, in which the order of publication was issued, or executed, so as to bring the matter before the inferior court and have the question as to the sufficiency of the order of publication passed upon by that court, and the decree recites that the order of publication as to the absent defendants was 'duly executed,' the objection that it was not so executed will not be entertained by the appellate court."

In the case of *Taylor's Executors* vs. *Cox,* 32 W. Va. 149, the court held:

"Although an attachment sued out in this case appears to have been quashed, yet, the decree of the court below recited, that the cause was heard upon the attachment duly levied upon the lands of J. O. C., in this court said attachment must be

taken to have been in full force and effect, duly sued out and levied as required by statute."

English, Judge, in the opinion, says:

"Is it to be presumed, that the Circuit Court of said County would in two successive decrees recite the fact, that the case came on to be heard upon the attachment sued out and levied, if there was no such attachment? I think not.

"In the case of *Moore* vs. *Holt*, 10 Gratt. 284, it is held: 'Where the decree states, that the order of publication against the absent defendant had been duly published, it is to be taken in an appellate court, that everything required by the statute has been done'; and in this case, the decree stating that the case was heard upon the attachment duly levied upon the lands of the defendant James O. Cox, it is to be taken that there was an attachment regularly sued out and properly levied upon said lands."

In the case of *Voorhees* vs. *Jackson,* 10 Peters 449, 9 L. Ed. 490, the Court held:

"Ejectment for a tract of land commenced in 1831, which had been sold under the foreign attachment laws of Ohio; the defendants in the ejectment being in possession under the defendant in the attachment. The judgment, in the Common Pleas of Hamilton County, Ohio, in the attachment suit was entered in 1808. The writ of attachment was returnable to April, 1807; and it recited that it had been sufficiently testified to the court that the

defendant, not residing in the State, was indebted to the plaintiff. The tract of land was attached, and returned with an inventory and appraisement. The defendant having made default, auditors were appointed, and at December Term they made a report, finding due to the plaintiff $267. The court ordered the property to be sold by the auditors. At April Term, 1808, they reported they had sold the premises for $170. The court, on inspection, confirmed the sale. The auditors afterwards conveyed by deed to Samuel Foster and William Woodward, who on the same day, 28th of May, 1808, conveyed the premises to William Stanley, with covenant of seisin, power to sell and general warranty, under whom the plaintiffs in the ejectment derived title. The proceedings in the attachment were in conformity with the Ohio attachment laws in all particulars, except, 1. No affidavit, as required by the statute, was found filed with the clerk; and the law provides that, if this is not done, the writ shall be quashed, on motion. 2. Three months' notice of the attachment is to be given in a newspaper, and fifteen days' notice is to be given by the auditors; which did not appear to have been done. 3. The defendant is to be called three times preceding judgment, and the defaults recorded. No record appeared to have been made. 4. Auditors are not to sell until twelve months, and it did not appear when the sale was made. 5. The return of the sale shows a sale to Foster and Woodward, and a deed was made to Stanley, and no connection between them was shown in the record.

BY THE COURT: The several courts of com-

mon pleas of Ohio, at the time of these proceedings, were courts of general civil jurisdiction; to which was added, by the Act of 1805, power to issue writs of attachment, and order a sale of the property attached on certain conditions; no objection, therefore, can be made to their jurisdiction over the case, the cause of action or the property attached. The process which they adopted was the same as prescribed by the law; they ordered a sale, which was executed, and on the return thereof gave it their confirmation. This was the judgment of a court of competent jurisdiction on all the acts preceding the sale, affirming their validity, in the same manner as their judgment had affirmed the existence of a debt. There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. This rule applies as well to every judgment or decree rendered, in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record; which thenceforth proves itself, without referring to the evidence on which it has been adjudged.

That some sanctity should be given to judicial proceedings; some time limited, beyond which they should not be questioned; some protection afforded to those who purchase at sales by judicial process, and some definite rules established by which property thus acquired may become transmissible, with security to the possessors, cannot be denied. In this country particularly, where property, which

within a few years was but of little value, in a wilderness, is now the site of large and flourishing cities; its enjoyment should be at least as secure as in the country where its value is less progressive.

It is among the elementary principles of the common law that whoever would complain of the proceedings of a court must do it in such time as not to injure his adversary by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into court, he must do it before he submits to the process adopted. If the proceedings against him are not conducted according to the rules of law and the court, he must move to set them aside for irregularity; or, if there is any defect in the form or manner in which he is sued; he may assign those defects specially, and the court will not hold him answerable till such defects are remedied. But if he pleads to the action generally, all irregularity is waived, and the court can decide only on the rights of the parties to the subject matter of controversy; their judgment is conclusive, unless it appears on the record that the plaintiff has no title to the thing demanded, or that in rendering judgment they have erred in law. All defects in setting out a title, or in the evidence to prove it, are cured; as well as all irregularities which may have preceded the judgment."

In the case of *Applegate* vs. *Lexington and Carter County Mining Co.,* 117 U. S. 255, 29 L. Ed. 892, the Court held:

"Where a court of general jurisdiction is authorized to bring in by substituted service nonresident defendants interested in property within

> its jurisdiction, but is not required to place the proof of service upon the record, and it orders such service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record; and a judgment affecting the property will be valid."

It will be noted in this connection that there is nothing in the West Virginia statutes hereinbefore cited or any other West Virginia statutes, so far as we have been able to ascertain, that requires the proof of service by order of publication upon the record.

In the case of *Ballard* vs. *Hunter*, 204 U. S. 240, 51 L. Ed. 461, the Court held:

> "A decree for the sale of lands for unpaid levee taxes based on constructive service can not be deemed to deny a due process of law because there was not sufficient proof of publication of a warning order or notice filed or produced in court when the decree was made, where, under the local procedure, the entry of a warning order, even if required, is not jurisdictional." "A recital in a decree for the sale of lands for unpaid levee taxes that the nonresident defendants were 'severally constructively summoned by publication * * * proof of which has been previously filed herein' is conclusive as against a collateral attack based on the objection that there was no sufficient proof of publication of the warning order or notice filed or produced in court when the decree was made, where, under the local procedure, the entry of a warning order, even if required is not jurisdictional."

Mr. Justice McKenna, in delivering the opinion of the Court, says:

> "And the decree recites that the defendants 'were severally constructively summoned by publication * * * proof of which has been previously filed herein.' The contention of plaintiffs in error is therefore answered by *Grignon* vs. *Arter*, 2 How. 319, 11 L. Ed. 283; *Sargeant* vs. *State Bank*, 12 How. 371, 13 L. Ed. 1028; *Voorhees* vs. *Jackson*, 10 Peters 449, 9 L. Ed. 490; *Applegate* vs. *Lexington & C. County Min. Co.*, 117 U. S. 255, 29 L. Ed. 892."

Appellants in reference to this point cite several cases from other States. The decisions of the courts in other States would depend upon the statutes of those States, which might be entirely different from the statutes of West Virginia in reference to orders of publication, and in view of the fact that this question seems to be so well settled by the West Virginia cases and by the decisions of this Court, we do not deem it necessary to take up these cases cited by appellants.

(b) *By Order of Publication and Attachment of the Property Sold to Satisfy Plaintiff's Debt.*

The question as to the regularity of the order of publication has been discussed above and therefore under this heading the question of the validity of the attachment will be discussed and the claim of the appellants, to the effect that the affidavit for the attachment is bad, will be met.

As to this proposition appellees contend, first, that the affidavit was sufficient; second, that if the same is irregular and in the particulars claimed by the appellants, nevertheless such irregularities and defects do not affect

the jurisdiction of the Court, even if the court would not have had jurisdiction if there had been no attachment; and, third, that the court had jurisdiction of this case regardless of whether or not there was an attachment. This last propoistion, however, having been discussed above, and is therefore only referred to here.

IN GENERAL.

A copy of the record filed with plaintiffs' bill shows that affidavit was filed in accordance with Section 1, Chapter 106 of the Code of West Virginia, upon the ground that the defendants were non-residents of this State; that order of attachment issued and was levied upon the real estate in the bill and proceedings mentioned; that such attachment was sued out in the court of equity as provided for in said section; that there was an order of publication against all of the defendants duly published; that the officer levying said attachment made return in accordance with Section 7, Chapter 106 of the Code and that plaintiff acquired a lien upon the real estate in accordance with Section 9 of Chapter 106 of the Code; that said order of publication was in accordance with Section 17, Chapter 106 and as prescribed in Chapter 124 of the Code; that there was no appearance, either special or general, by any of the defendants at any time and that more than two years had expired since the entering of the final decree before this suit was brought in the District Court of the United States; that said defendants made no attempt to contest the right of attachment and filed no plea in abatement, nor made a motion to quash as provided for in Section 19, Chapter 106 of the Code; that the claim of plaintiff was, in the opinion of the court, established and judgment rendered by said

court, sale of said real estate ordered in accordance with Section 20 of Chapter 106 of the Code; that the Court prescribed in the order the terms of sale, person by whom it should be made, and complied with all other provisions of Section 21, Chapter 106 of said Code; that the Court required plaintiff to give bond with sufficient security and in the penalty prescribed by the Court, with condition that the plaintiff would perform such further orders as might be made by the Court in case the defendants appeared and made a defense therein within the time prescribed by law and as provided by Section 22 of Chapter 106 of said Code; that defendants did not within two years from the date of final decree petition to have the proceedings in said suit reheard as provided by Section 25, Chapter 106 of said Code; that after the expiration of said two years, to-wit, on the 19th day of May, 1923, an order was entered in said suit discharging said bond and releasing the surety company from further liability thereon. (R. 43.)

REGULARITY OF AFFIDAVIT.

It has been noted from appellants' bill that the affidavit is claimed to be void, for the reason that it is claimed that, in order to have a valid attachment, the affidavit must set out the nature of plaintiff's claim with the same certainty and directness that is required in a declaration or other pleading, and that the affidavit filed in this case simply states that the plaintiff's claim is one arising out of contract. The affidavit in question will not support the claim made by plaintiffs.

Section 1, Chapter 106 of the Code of West Virginia provides, amongst other things, that when a suit in equity is about to be or is instituted for the recovery of a claim

or debt arising out of contract, the plaintiff, at the commencement of the suit or at any time thereafter and before judgment, may have an order of attachment against the property of defendants on filing with the Clerk of the court in which such suit is brought, his own affidavit or that of some creditable person, stating the nature of plaintiff's claim and the amount, at the least, which the affiant believes, the plaintiff is justly entitled to recover in the action or suit, and also that affiant believes that some one or more grounds exist for such attachment.

An examination of the affidavit (R. 33) will show that same is made by T. W. Ayres, attorney for plaintiff, and that he has strictly followed the statute; that he first avers that the plaintiff has instituted suit against the defendants for the recovery of a debt arising out of contract; that he next states the nature of plaintiff's claim with great particularity, saying that the debt comprises a total amount of $33,222.10; that said suit is also to set aside and annul two certain deeds and to subject said interest in said real estate of said W. B. Stephenson to sale for the purpose of satisfying any recovery in said suit; that on the 13th day of September, 1915, said plaintiff recovered a judgment in the Court of Common Pleas in Clearfield County, Pennsylvania, against the said W. B. Stephenson for $5,000.00; that on the same day there was a judgment against said Stephenson and another for $4500.00; that on the same day there was another judgment against said Stephenson and another for $5,000.00; that on the same day there was another judgment against said Stephenson and another for $5,000.00; that the last three judgments were duly assigned to said F. E. Cawley, who is now the owner of same; that said judgments with interest and costs therein remain unpaid and are due from said W. B. Stephenson to said F. E. Cawley and

that the said W. B. Stephenson conveyed by the two deeds aforesaid, for the purpose of avoiding said debts and to prevent the enforcement and collection of said judgments; that said conveyances are voluntary, null and void, and that said interest in real estate is subject to any attachment and decree against, or debts of, the said W. B. Stephenson, and that said affiant believes that the said F. E. Cawley is justly entitled to recover in said suit at least the sum of $33,222.10, etc.

The Court will also note that the aggregate of the judgments and costs amount to the penny to the amount stated in the affidavit that the plaintiff is entitled to recover. In other words, the affidavit states that the plaintiff is entitled to recover of W. B. Stephenson a debt arising out of contract in the sum of $19,602.10, with interest from the 7th day of August, 1908, comprising a total amount to this date of $33,222.10. The amount of the various judgments which are set out in said affidavit, including costs, amount to $19,602.10, and the affidavit states that each of said judgments bears interest from the 7th day of August, 1908, and the interest on said judgments from said 7th day of August, 1908, to the date of said affidavit added to the face of said judgments amount to $33,222.10.

There is no foundation, in fact, for the claim made in plaintiffs' bill to the effect that the nature of plaintiff's claim is not stated with sufficient particularity and that the only averment is that plaintiff's claim is one arising out of contract, as certainly a fair construction of the affidavit will show that if same has any fault, its fault is that it tries to follow the statute with too great particularity and that appellants' counsel in this case has mistaken the averment that plaintiff's claim is a debt arising out of contract, as an averment of the nature of plaintiff's claim, when such is not in fact intended and the "nature

of plaintiff's claim" is clearly set out in its proper place in the affidavit. Any other construction would most certainly be strained.

It seems to us that when this affidavit is construed in its entirety and effect given to every portion thereof there can be no doubt whatever that the nature of plaintiff's claim is set out in the greatest detail and complies with the statute and decisions of West Virginia in every respect.

Appellants' counsel are also wrong in their statement of the law when they say that the affidavit must set out the nature of the plaintiff's claim with the same certainty and directness that is required in a declaration or other pleading, although we maintain that such was done in this case.

In the case of *Todd & Smith* vs. *Gates*, 20 W. Va. 464, Snyder, J., in announcing the opinion of the Court, says:

> "It is first insisted by the plaintiff in error that the affidavit on which the attachment in this case is founded, is insufficient. There are several objections taken to said affidavit, but the only one I deem it necessary to notice is, that it does not state the nature of the plaintiff's claim as required by the statute. The affidavit states that the claim, 'is for transcript of foreign judgment.' In McClung v. Jackson, 6 Gratt. 96, under a statute which required the plaintiff to state, in his attachment, the character of his claim, the court held that the statute did not require the plaintiff to describe his claim with the precision of a declaration, nor was it necessary for him to state whether it was due by bond, note, account or otherwise. See also Hay-

wood v. McCrery, 33 Ill. 459; Theirman v. Vahle, 32 Ind. 400; Sullivan v. Fugate, 1 Heis. 20; Klenk v. Schwalm, 19 Wis. 124.

Under these authorities it seems to me the affidavit is sufficient."

In the case of *Duty* vs. *Sprinkle*, 64 W. Va. 39, the Court held:

"Mere difference between the declaration and affidavit in respect to the *quantum* of descriptive matter pertaining to the cause of action, both being in perfect agreement as far as such matter is set forth, does not constitute inconsistency or variance, such as will vitiate the attachment."

In the case of *Flannigan* vs. *Tie & Lumber Company*, 77 W. Va. 158, Lynch, J., in delivering the opinion of the Court, says:

"Defendant challenges the sufficiency of the affidavit made as the basis for the issuance of the attachment writ. The criticism is directed against the clause stating that the action is 'for the recovery of money due upon contract.' This clause alone clearly would be an insufficient justification for the award of that process. It does not state the nature of the claim to be enforced by the action and writ. But the affidavit specifies with necessary particularity the items of the account sued on, and thereby sufficiently shows the nature of such claim."

It seems to us that the case at bar comes clearly within

the rule laid down in *Flannigan* vs. *Tie & Lumber Company, supra.* The rule laid down there was that the affidavit, even though it stated that the action was for money due on contract, was sufficient where it specified the items in the account sued on. In this case it will be noted that the affidavit sets out with great particularity the four foreign judgments sued on and itemizes each as to the amount, costs, date when interest commences, and other particulars concerning the same.

Even if the Affidavit is Irregular in the Particulars Claimed by Appellants, Nevertheless the Court Has Jurisdiction.

In this connection we wish to call attention to the case of *Miller* vs. *White,* which seems to be directly in point and conclusive in this case.

The third syllabus is as follows:

> "Where there is no service of process or appearance, and the seizure of property of defendants is the foundation of jurisdiction, defective or irregular affidavits for attachment, though they might reverse a judgment in the case for error in departing from the statute, do not make the suit one without jurisdiction if the court have jurisdiction in cases of that class. A total want of affidavit for attachment in such case would show there was no jurisdiction, but a mere insufficient averment in the affidavit would not. *Cooper* v. *Reynolds,* 10 Wall. 309." *Miller* v. *White,* 46 W. Va. 67.

To practically the same effect is *Hall* vs. *Hall,* 12 W. Va. 1.

The above *Miller* vs. *White,* case has been followed and cited with approval and the doctrine laid down in Syllabus 3 has never been modified or reversed by the courts.

See

McIntosh vs. *Augusta Oil Co.,* 47 W. Va. 833-837;
Caswell vs. *Caswell,* 84 W. Va. 575-582.

In the case of *Cooper* vs. *Reynolds,* 77 U. S. 308, 19 L. Ed. 931, the Court held:

> "Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause.
>
> Jurisdiction of the *res* is obtained by a seizure under the process of the court, whereby it is held to abide such order as the court may make concerning it.
>
> In attachment cases, the levy of the writ of attachment on the property is the one essential requisite to jurisdiction.
>
> Though affidavit preliminary to issuing the writ may be defective, that can not deprive the court of the jurisdiction acquired by the writ levied upon defendant's property.
>
> When the writ has been issued, and the property seized, condemned and sold, this court can not hold that the court below had no jurisdiction for want of a sufficient publication of notice."

We do not think that the case of *Demming National Bank* vs. *Barker,* 83 W. Va. 429; *Citizens National Bank* vs. *Dixon,* 94 W. Va. 21, and *Pelley* vs. *Hibner,* 93 W. Va. 169, are in point for the reason that in each of these cases there was something omitted from either the notice or the

affidavit which was necessary to connect the defendant with the note or claim, as, otherwise, there would have been no liability against the defendants. In the first of said cases the court held that notice of dishonor was necessary to connect the defendant with the note sued on, and in the second of said cases the court held that, because it was not alleged in said notice that Barnes signed the note, the notice was insufficient because it did not show any liability against the defendant Barnes. In the last of said cases the court held that the notice and affidavit failed to state that the claim was either due and owing to the plaintiffs or due and owing by the defendant, and for this reason the notice and affidavit was held insufficient. As we see it, none of these cases are in point with the case under discussion. Naturally you have to connect a defendant with the suit and in each of the cases cited the court held that this was not done. No such question as this arises in the case at bar.

2. THE CIRCUIT COURT HAVING ACQUIRED JURISDICTION, ITS DECREES ARE NOT VOID BUT MERELY VOIDABLE.

(a) *Advantage of Errors Can be Taken Only by Appeal or Appearances Within the Time Allowed Under the Statute.*

(b) *Jurisdiction Once Acquired the Action of the Circuit Court of Nicholas County is not Subject to Collateral Attack.*

(c) *The United States District Court for the Southern District of West Virginia is a Court of Concurrent Jurisdiction with the Circuit Court of Nicholas County, West Virginia, and Has no Appellate*

Powers Nor Jurisdiction to Review the Action of the Circuit Court of Nicholas County.

Appellees contend that the Circuit Court of Nicholas County having once acquired jurisdiction the law provides adequate means for making defense, not only during the pendency of the suit, but within two years after the entering of the final decree. Appellants are limited to such defense as they could have made in that suit.

> "By attachment sued out pursuant to Chapter 106 of the Code of this State, and levied on the lands or personal property of the defendant, a lien is thereby acquired and the court first to take jurisdiction thereby acquires the exclusive jurisdiction and dominion over the property, with the right to pronounce and enforce any judgments or decrees respecting the same, and this is so whether the property attached be real or personal property taken into actual custody of the officer."
>
> *McGrew* vs. *Maxwell,* 80 W. Va. 718.

We further maintain that the Circuit Court having taken jurisdiction and having decreed all the questions arising on the bill, a suit can not now be maintained in the District Court of the United States, even though originally the suit brought in the Circuit Court of Nicholas County might have been the subject of removal to the United States District Court.

> "Nor can another court of concurrent jurisdiction so interfere by injunction or otherwise upon the principle of avoiding multiplicity of suits; want of equity of the subject matter of the contraversy;

merger of the cause in the judgment or decree of some other court in a foreign jurisdiction. All such supposed rights involve questions proper to be presented to the court first to acquire jurisdiction and dominion over the property involved, as provided either by statute or by some other suitable proceeding of intervention in that court."

McGrew vs. *Maxwell, Id.*

"Under our law * * * there is practically no distinction between this sort of mesne process (attachment) and final process of execution. By the one as well as by the other the court acquires the custody and dominion over real as well as personal property, with the right to protect that custody and possession against the encroachment of any other court of co-ordinate or concurrent jurisdiction."

McCrew vs. *Maxwell, Id.*

The attention of the Court on this question is called to the case of *Voorhees* vs. *Jackson, supra,* a case decided by this Court. In that case it is said:

"So long as this judgment remains in force, it is in itself evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment, the errors of the court, however apparent, can be examined only by an appellate court, and by the laws of every country, a time is fixed for such examination, whether in rendering judgment, issuing execution or enforcing it by process of sale or imprisonment. No rule can be more reasonable than that the person who complains of an injury done him should avail himself

of his legal rights in a reasonable time or that that time should be limited by law.

The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reviewable only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so."

In fact all questions raised by appellants in their brief as to the irregularity of the attachment, as to the want of evidence, as to the irregularities in the sale or other questions, are without exception questions which they could and should have taken advantage of on appeal and which, in our opinion, can not now be considered in this suit.

> "It is next claimed as error that the plaintiff, by affidavit or bill, does not show any grounds for attachment, and this suit should have been dismissed for want of equity. This assignment is met by the fact that no motion was made to quash the affidavit or attachment in the circuit court, and the plaintiff, in his bill, alleges that upon his affidavit as prescribed by law, he has obtained from the clerk of said court an order of attachment against the defendant oil company, which allegation is not controverted in the answer. The question raised as to the validity of the attachment comes too late. In Kesler v. Lapham, 33 S. E. 289, this Court held that the supreme court will not consider questions not yet acted on by the circuit court."
>
> *McIntosh* vs. *Augusta Oil Co.,* 47 W. Va. 836.

Referring to the above quotations. It seems clear to us that if the Supreme Court holds that the question as to the validity of an attachment comes too late when presented to that court, then it certainly comes too late when attacked in other proceedings in a court which did not first acquire jurisdiction and whose hands are therefore tied.

The same case, in further discussing the question of attachment, says:

> "Now, the record presented for our consideration contains a proceeding by way of attachment in equity, which, so far as any pleadings or ruling in the circuit court is concerned, remains unassailed; and, such being the case, the jurisdiction in a court of equity cannot be questioned."
>
> *McIntosh* vs. *Augusta Oil Co., Id.*

It seems clear to us from all of the decisions and from the statutes of West Virginia that defendants proceeded against by order of attachment and order of publication are given every possible opportunity to make defense in such proceedings, and that such proceedings are final as to any property attached and sold therein. This is certainly as it should be and in the case before us, the plaintiffs in this suit have certainly showed no special grounds for consideration. They claim that there were irregularities in the affidavit for attachment, but irregularities could and probably should have been brought to the Circuit Court's attention by motion to quash or plea in abatement in the suit in the Circuit Court. While plaintiffs claim that they had no actual notice of the pendency of this suit, we know of no requirement which

provides that they shall have actual notice. The institution of the suit and the order of publication give the court jurisdiction and, in this case, the parties now complaining, waited for more than three years after the commencement of the suit in the Circuit Court of Nicholas County before attempting to protect their interests in any manner, notwithstanding the fact that the real estate now claimed by them in Nicholas County was of great value; that they kept a tenant on the land to inform them of matters affecting the land; that there would have been slight expense to have subscribed to the county papers so as to keep informed of any proceedings against the land; that they were in communication with the Assessor and Sheriff at least once a year during all of said time and it seems peculiar that, according to them, they should have found out about the proceedings in Nicholas County almost immediately after the expiration of two years and should have had no knowledge of same whatever prior to that time.

It is not our intention to quarrel with appellants, however, as to their knowledge or lack of knowledge. They were given all of the notice required by law and delayed prosecuting this case in the United States District Court until the rights of innocent parties had intervened; until the land had been sold and purchased by the defendants, Kirtley and Herold; sale confirmed, all purchase money paid and deed executed, and then for the first time do they complain.

The law provides ample remedy for non-resident defendants and, in fact, for all defendants, in matters of equity.

Even though the defendants in the Circuit Court of

Nicholas County had appeared and made a motion to quash the attachment, the plaintiff would have had a right to have the case retained on the docket for a new process and new order of attachment, if advised; whereas, in the proceedings now attempted to be brought in the United States District Court, this right would seemingly be denied the plaintiffs. See *Danser* v. *Malone*, 77 W. Va. 26.

The method of defense available to the defendants in the Circuit Court of Nicholas County is provided for in Section 19, Chapter 106 of the Code and, amongst other things, provides that the right to sue out an attachment may be contested; that if the defendant desires to contravene the existence of grounds for attachment, he may file plea in abatement and have such issue tried by a jury; that when attachment is properly sued out and the case heard upon its merits, if the court be of the opinion that the claim of the plaintiff is not established, final judgment shall be given for defendant. The decisions also hold that an attachment irregularly issued ought to be quashed *ex-officio* by the court in which it is returnable, even though no plea filed by the defendant, and, therefore, in this case, the Circuit Court must have affirmatively held that the attachment was sufficient

Mantz v. *Hendley*, 2 H. & M. 308.

> "It is competent for any party interested and filing his petition disputing the validity of plaintiff's attachment, as provided for under Section 24 of chapter 106, to move the court to quash the affidavit and attachment * * *."

Capehart's Exr. v. *Dowery*, 10 W. Va. 130.

"A decree overruling a motion to quash an attachment is an interlocutory but appealable decree, and does not preclude a renewal of the motion at the same or any subsequent term before final decree."

Elkins National Bank vs. *Simmons,* 57 W. Va. 1.

"The right to move to quash an attachment on the ground of an insufficient affidavit is not under section 19 of Chapter 106 waived by appearance and filing an answer."

Dulin vs. *McCaw,* 39 W. Va. 721.

See also

Taylor Exors. vs. *Cox,* 32 W. Va. 148.

The Defense to Proceedings By Attachment as Well as the Proceedings Themselves are Statutory and, Consequently, the Mode of Defense Prescribed by Statute Must be Strictly Pursued.

For the above see:

Stevens vs. *Brown,* 20 W. Va. 450.
Bank of the Valley vs. *Bank of Berkley,* 3 W. Va. 386.
Middleton vs. *White,* 5 W. Va. 572.

The Defendants in the Circuit Court Also Had a Right to a Rehearing Within Two Years and Failed to Take Advantage of That Right.

Section 25, Chapter 106 of the Code, *supra.*

This section applies to proceedings wherein an attachment has been sued out and levied upon the property of defendant and in this sort of proceedings, a rehearing is provided for in cases where the defendant did not appear and make defense.

Farrell vs. *Camden,* 57 W. Va. 401.

See also

Johnson vs. *Ludwick,* 58 W. Va. 464.

Peoples Nat. Bank vs. *Burdette, Judge,* 669 W. Va. 369.

Hayman v. *Monongahela Consol. C. & C. Co.,* 81 W. Va. 144.

Defendants in the Circuit Court Not Having Appeared in the Suit Were Not Entitled to an Appeal but Were Entitled to a Rehearing Under Section 25, Chapter 106 of the Code, and Not Being Entitled to an Appeal and Not Having Taken Advantage of the Rehearing, We Do Not See How They Can, After the Expiration of Two Years, Maintain a Separate Suit in a Different Court.

"An absent defendant, against whom a decree has been made, cannot appeal from the decree. His only remedy is that provided by statute."

Banks vs. *Snyder,* 6 W. Va. 24-33.

Meadows vs. *Justice,* 6 W. Va. 198.

Lynch vs. *Hoffman,* 7 W. Va. 553.

Foland vs. *Brownfield,* 73 W. Va. 270.

Defendants in the Circuit Court Would Have Been Limited As to the Time for Applying for a Removal of Said Cause to the United States District Court Upon the Ground of Diversity of Citizenship and, Therefore, Not Having Made Application Within the Time, How

Can They Now Attempt to Bring a New Action in the United States District Court on This Ground After the Circuit Court of Nicholas County Has Not Only Taken Jurisdiction But Has Fully Passed On All Questions Involved?

It has been seen from citations heretofore made in this brief that the court first taking jurisdiction in matters of attachment acquires right to such jurisdiction which ccanot be taken away either by courts of concurrent or coordinate jurisdiction.

See *McGrew* vs. *Maxwell, supra.*

It has also been seen that another court can not interfere by injunction or otherwise and, therefore, we maintain that the plaintiffs in this suit, having lost the right to a removal of the case from the Circuit Court of Nicholas County, West Virginia, to this Court, have likewise lost the right to maintain an independent action in this Court which has no other object than to now make such defense as would have been made in the Circuit Court of Nicholas County, West Virginia, or could have been heretofore made in this Court, had said case been removed in due time.

3. APPELLEES, H. L. KIRTLEY AND H. W. HEROLD, WERE NOT PARTIES TO THE SUIT IN THE CIRCUIT COURT OF NICHOLAS COUNTY, BUT MERELY PURCHASERS OF PROPERTY UNDER THE DECREES IN THAT SUIT. THAT SUIT HAVING FINALLY ENDED BEFORE THE INSTITUTION OF THE SUIT IN THE UNITED STATES DISTRICT COURT, THERE WAS NO LIS PENDENS AS TO THEM AND THEIR PURCHASE BECAME FINAL.

(a) *Said Kirtley and Herold in Any Event Should Be Protected in Their Purchase.*

(b) ***Any Issues Raised in the Suit Now Pending and Decrees Thereon Should Be Restricted to the Fund Arising From Said Sale, and Should Not Be Permitted to Affect the Title of Appellees, Kirtley and Herold, at This Time.***

The courts hold that a purchaser of real estate *pendente lite* takes title subject to the outcome of the pending suit but they also hold that such purchaser is not a purchaser *pendente lite* when any time intervenes between the final decree of the suit and the institution of another suit and for this purpose, it is held that even an appeal to an appellate court is a new suit and the purchaser is protected unless there is a *lis pendens* and unless the writ of error of the appellate court also grants a supersedeas. It has also been held in numerous cases that a bill of review is a new suit and, of course, it can not be contended in this suit that the present suit instituted by John W. Stephenson and others in the District Court of the United States for the Southern District of West Virginia against Kirtley and Herold, who were not parties to the suit in the Circuit Court, is not a new suit. There was no *lis pendens* between the final decree of the Circuit Court of Nicholas County and the institution of this suit. Granting that Kirtley and Herold were purchasers *pendente lite* until the expiration of the two years provided by statute from the entering of the final decree, in which the defendants had a right to a bill of review, it certainly can not be contended that they are purchasers *pendente lite* after that time and, therefore, it seems perfectly clear that no order or decree should be entered by the District Court of the United States which will in any wise affect their title to the real estate purchased.

In the case of *Perkins* vs. *Pfalzgraff,* 60 W. Va. 121, it was held that the rights acquired *bona fide* by a third person under a final decree rendered by a court of competent jurisdiction would not be affected by any subsequent reversal of the decree upon a bill of review.

Attention is also called to the fact that in the Statutes of West Virginia, Sec. 26, chapter 106, *supra,* and Sec. 8, chapter 132, *supra,* it is also held that the right of purchasers shall not be affected, but that non-resident defendants who have not appeared during the pendency of the suit but asking for a review within the two years provided, are limited to the proceeds of sale and such review can not affect the title to the property.

In *Hollister* vs. *Mann,* 40 Nebr. 572, 58 N. W. 1126, it was held that an order confirming a sale was just as final as a final judgment, and left pending nothing which would impart notice of what might result provided proceedings should be commenced to set aside such order of confirmation.

Under a statute providing that a party constructively summoned in a suit might, within five years of the date of the judgment, have the same opened and be let in to defend, it was held in *Scudder* v. *Sargent,* 15 Nebr. 102, 17 N. W. 369, that a purchaser of land under a judgment afterwards opened in accordance with the terms of the statute above mentioned was not a purchaser *pendente lite* where the purchase was prior to the actual opening of the judgment. And to the same effect are *Keene* v. *Sallenbach,* 15 Nebr. 200, 18 N. W. 75; *Citizens State Bank* v. *Haymes,* 56 Nebr. 394, 76 N. D. 867; and *Keller* v. *Stanley,* 86 Ky. 240, 5 S. E. 477.

In *Rector* v. *Fitzgerald,* 8 C. C. A. 277, 19 U. S. 423, 59 Fed. 808, the court said:

> "In our judgment, one who purchases after the lapse of the term at which a final decree on the merits is rendered, without notice that a bill of review is in contemplation or will be exhibited, should be protected from the effect of a decree on such a bill if it is subsequently filed. After a final decree, the losing party, by proper diligence, can always guard against the risk of losing the fruits of the litigation by a sale to an intermediate purchaser; and, on grounds of public policy, it is better to exact of him such diligence in the prosecution of his claim than to suffer the title of valuable property to be clouded for an indefinite period by the possibility that the litigation may be renewed by a bill of review."

But, even independently of that proposition, it was held that, under the particular circumstances of the case, the rule of *lis pendens* could not be successfully invoked against the purchaser.

See also

Ludlow vs. *Kidd,* 3 Ohio. 541.

Thus in *Cheever* vs. *Minton,* 12 Colo. 557, 13 Am. St. Rep. 258, 21 Pac. 710, it was held that the title of a purchaser in good faith which rested upon a voidable decree in chancery, the purchase having been made after the entry thereof, and before a writ of error was sued out, would not be affected by a subsequent reversal of the de-

cree on error. And this was followed by *Stout* vs. *Gully,* 13 Colo. 604, 22 Pac. 954.

So, also in *Wadhams* vs. *Gay,* 73 Ill. 111, 415, it was held that parties claiming title under a decree in full effect and before a writ of error had been prosecuted, or any other legal steps had been taken to avoid it, would be protected notwithstanding a subsequent reversal of the decree. And this decision was followed by the later Illinois decisions of *Eldridge* vs. *Walker,* 80 Ill. 270; *Barlow* vs. *Standford,* 82 Ill. 298; *Mulvey* vs. *Gibbons,* 87. Ill. 367.

There are numerous other cases holding that a writ of error is a new suit; and, therefore, a *bona fide* purchaser after the decree and before the suing out of a writ should take title free from the final outcome of the writ of error. Among those cases may be noticed, *McCormick* vs. *McClure,* 6 Blackf. 466, 39 Am. Dec. 441; *Macklin* vs. *Allenberg,* 100 Mo. 337, 13 S. W. 350, etc.

In the case of *Winfield* vs. *Neil,* 60 W. Va. 106, 54 S. E. 47, it is held that one who, after final decree and termination of the suit, and before an appeal is obtained, purchases, in good faith, property which is the subject of the litigation, it will be protected in such purchase.

This same suit lays down a test as to whether a purchaser is a purchaser *pendente lite* or otherwise. The test is laid down in Syllabus 4, which is as follows:

> "In determining the question as to whether or not a purchase is made *pendente lite,* the test is, Was there, at the time of the purchase a suit pending, involving the rule of *lis pendens?* If so, the purchase is *pendente lite.* It is otherwise if there is no such suit pending."

In *Perkins* vs. *Pfalzgraff, Id.*, it is further held that rights acquired *bona fide* by a third party under a final decree rendered by a court of competent jurisdiction are not affected by a subsequent reversal thereof. The decree being final, the bill of review is a new suit, having for its object the correction of the final decree in a former suit.

A reading of the above case will also show that many points in issue are similar to the case now under consideration.

The case of *Voorhees* vs. *Jackson, supra,* hereinbefore cited as to various other propositions in this case, is also applicable to this question.

4. THE POINT RAISED BY APPELLANTS THAT THE DECREES OF THE CIRCUIT COURT OF NICHOLAS COUNTY SHOULD BE HELD VOID BECAUSE NOT SUSTAINED BY THE EVIDENCE IS NOT WELL TAKEN.

(a) *Such Question Is Not Subject to Collateral Attack.*

(b) *The Record and Recitals in the Decrees Disclose That There Was Evidence Before the Court.*

(c) *In the Absence of Affirmative Proof to the Contrary, the Presumption of Law is In Favor of the Jurisdiction of the Circuit Court of Nicholas County.*

Appellants contend that the record shows that there was no evidence to sustain the judgment setting aside the deeds to plaintiffs and decreeing sale.

It seems to us that the question of sufficiency of evidence is not a matter which can be raised in this suit. That there was such evidence, there can be no doubt.

The decree of the Circuit Court states, "and it further appearing to the satisfaction of the court from the papers and evidence in this case," etc. It seems to us that this statement is conclusive. While there may not have been depositions, nevertheless plaintiff's claim was fully shown by certified copies of the foreign judgments filed with the bill. The deeds asked to be set aside were shown by certified copies and such deeds on their faces show that the time of transfer was very near the date of the judgments against said W. B. Stephenson and in the first of said deeds, it is stated that W. B. Stephenson, "desiring to convey a portion of *his* interest in said tract of land to the parties of the second part, executes this deed." The affidavit for attachment sets up the fraud and plaintiff's bill sets forth the same averment of fraud and the fact that the conveyances were voluntary. The plaintiff was present upon the hearing of said case and may have been heard. The defendants have been proceeded against by order of publication and, in addition thereto, there was every reason to believe that they had actual notice of the pendency of the suit, they having an agent living in Nicholas County on or near the land in controversy, so it seems to us that in view of the express statement of the Court as to considering evidence before it, that it can not now be successfully contended that there was not sufficient evidence to sustain the decree or that the decree would be absolutely void and susceptible of attack in an independent proceeding for this reason—"Matters alleged in a bill in equity not expressly denied, will be taken as true and no proof thereof will be required."

McDermott vs. *Prentiss Gas Co.*, 82 W. Va. 230.

See also

Irons vs. Croft Hat, etc., Co., 866 W. Va. 685.

15 *Ruling Case Law,* page 862, in reference to the insufficiency or incompetency of evidence, says:

> "A judgment of a competent court can not be collaterly attacked on the grounds that it was rendered upon insufficient evidence or incompetent evidence or even without any evidence. Thus if a court has power to act on proof of a given fact, its action on the statement of such fact by an unsworn witness is not for that reason alone entirely void so as to render its judgment void when questioned collaterally. Where the court has jurisdiction a decree without proof or upon insufficient proof is one in the exercise of jurisdiction and can only be the subject of appeal or review. Where a finding of fact is essential to the validity of a judgment the court on collateral attack will presume that such fact was found and a judgment is immune from impeachment on the ground that it is not supported by the findings or that no findings were made. Mistakes in findings of facts by the court usually are not grounds for a collateral attack on the judgment, and it makes no difference how erroneous the determination of facts may be. If the rule was otherwise there would be no final settlement of disputed controversies."

34 *Corpus Juris,* page 562, says:

> "A judgment of a court having jurisdiction can not be impeached collaterally by showing that the evidence on which it was based was illegal, inadmissible or insufficient to sustain the judgment. Indeed the courts have gone so far as to say that a judgment entered in the absence of any evidence

is valid and binding until set aside by some regular proceeding."

In the case of *Leslie* vs. *Gibson,* 80 Kan. 504, 26 L. R. A. (N. S.) 1063, Benson, J., in delivering the opinion of the Court, says:

> "Finally, it is contended that the order opening the judgment was void because there was no proof that the mortgage company did not have notice of the pendency of the action in time to appear and defend. To make the order without such proof may have been erroneous, but did not oust the court of jurisdiction, and the judgment was not void. A judgment may be erroneous but not void, merely because of a defect in the proof, if the court has jurisdiction of the parties and the subject matter."

In the case of *Brown* vs. *Webb,* 121 Ga. 281, 48 S. E. 917, the Court held:

> "On the trial of an affidavit of illegality to an execution the defendant in execution can not go behind the judgment on which the execution is based by showing that the judgment was rendered without sufficient evidence."
>
> "Where in an action in a justice's court upon a sworn account, there was service upon the defendant by leaving a copy of the summons and account at her most notorious place of abode, and defendant did not appear and plead and judgment was rendered in favor of the plaintiff, such judgment is conclusive as against an affidavit of illegality

based upon the ground that plaintiff had introduced no evidence save the verified account, and that judgment could not legally have been rendered by default because there had been no personal service upon the defendant."

In the case of *Thacker* vs. *Chambers* (Tenn.), 42 Am. Dec. 431, the Court, in the opinion, says:

"But it is insisted, that Williams did not have such evidence of his purchase from Chambers as would authorize the decree in his favor. That may be very true, but it is a matter that can not be inquired into in this suit. The court had jurisdiction of the cause, and having made a decree, vesting the title in the defendant Williams, it is not competent in this collateral proceeding between other parties to investigate the ground of proof, upon which the court acted."

In the case of *Parsons* vs. *Parsons,* 101 Wis. 76, 70 A. S. R. 894, the court held:

"A judicial determination may be contrary to conclusive evidence, or legal evidence, or without any evidence, yet not collaterally impeachable for want of jurisdiction."

In the case of *Meyers* vs. *McGavock,* 39 Nebr. 843, 42 A. S. R. 627, the Court held:

"The finding and judgment of a court can not be successfully assailed as void, in a collateral proceeding, on the ground that the court made such finding or rendered such judgment on incompetent evidence."

In any event the decree states that there was evidence in addition to the papers in the suit, and we do not believe that any court will now say in a proceeding of this kind that there was not evidence or that the evidence was insufficient. We do not agree with the attorneys for appellants that the record affirmatively shows that there was no evidence whatever, and in this connection we particularly call the Court's attention to the part of the decree on this point hereinbefore quoted.

The case of *Winston* vs. *McVeigh*, 93 U. S. 274, cited in appellants' brief, is clearly not in point with the case at bar. In that case the defendant was a non-resident and was proceeded against by notice of publication and in answer thereto the defendant appeared by counsel and made answer, which, on motion, was stricken from the file, on the ground that the defendant was an alien enemy. No such state of facts exist in the case under discussion.

The case of *Hovey* vs. *Elliott*, 167 U. S. 409, cited by appellants, is also clearly not in point with the case at bar. In that case the trial court obtained jurisdiction of the defendant by proper process, but struck his answer from the files until he should purge himself of contempt. No such situation as this exists here.

The case of *Parsons* vs. *Russell* (Mich.), 83 Am. Dec. 728, cited by appellants, involved a statute of the State of Michigan, which undertook to provide a seizure and sale of certain property without proof establishing such claim before a judicial tribunal. This statute is entirely unlike the statutes of West Virginia under which the suit in the Circuit Court of Nicholas County was instituted, and,

therefore, we do not see where the case of *Parsons* vs. *Russell* has any application whatsoever to the case at bar.

The facts in the case of *Remer* vs. *MacKay,* 35 Fed. 86, cited by appellants, are not similar to the facts in the case under discussion. In that case Remer was indebted to MacKay and both were citizens of Illinois. Remer's wife obtained a deed to land in Iowa from a third party and MacKay sued Remer and wife in Iowa by substituted service. The Iowa State Court rendered judgment in favor of MacKay against Remer and, without setting aside the deed to Remer's wife or decreeing that she held the same in truth for her husband, directed the sale of the land, which was accordingly sold and conveyed to the plaintiff, MacKay. In the case at bar the decree enters judgment in favor of Cawley against W. B. Stephenson, holds that the deeds sought to be set aside were made to hinder, delay and defraud the creditors of the said W. B. Stephenson, and especially the plaintiff, F. E. Cawley, in respect to the debt and demand therein adjudged to said plaintiff and decrees the said deeds to be set aside and held for naught, but so far only as the said debt and demand of said plaintiff, F. E. Cawley, is concerned, and then decrees that the property covered by said deeds, or so much thereof as may be necessary, be sold to pay the plaintiff's said debt and interest, etc., and the same was sold in compliance with said decree and was purchased by H. L. Kirtley and H. W. Herold, who were entire strangers to the suit. Thus it will be clearly seen that the facts in the case of *Remer* vs. *MacKay* are entirely different from the facts in the case at bar, and, therefore, the decision in the case of *Remer vs. MacKay* should in no way be binding upon this Court in deciding this case.

We also do not think that the case of *Ex Parte Sam-*

uel, 82 W. Va. 486, is in point, for the reason that in that case the magistrate did not hear any evidence at all and in that case it was not a question of the sufficiency or insufficiency of evidence.

CONCLUSION.

We respectfully submit that the decree of the United States District Court for the Southern District of West Virginia sustaining the motion of the appellees, Kirtley and Herold, to dismiss the bill should be affirmed for the several reasons set out above, and more particularly because (1) the Circuit Court of Nicholas County had jurisdiction of the subject matter and of the defendants, and therefore all proceedings in said suit in Nicholas County were voidable, and not void, and advantage could only be taken of same either by appearance in that suit or appeal to the Supreme Court of Appeals of West Virginia or by bill of review, unless said case had been removed to the United States District Court within the time allowed by law, in which event further proceedings would have been in that Court; and (2) because said Kirtley and Herold are not purchasers *pendente lite* within the law and therefore no decree could or should be entered in this case affecting their title to the land in controversy or affecting them in any way.

Respectfully submitted,

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